Nos. 86-1380, 86-1424 and 87-469



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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ARKANSAS PUBLIC SERVICE COMMISSION, *et al.*,
*Petitioners*,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
*Respondent*.

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ARKANSAS POWER & LIGHT COMPANY,
*Petitioner*,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
*Respondent*.

---

REYNOLDS METALS COMPANY, *et al.*,
*Petitioners*,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
*Respondent*.

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**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF OF RESPONDENT SYSTEM ENERGY RESOURCES, INC. IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission ("FERC" or "Commission"), in order to establish just and reasonable wholesale rates, has the authority to remedy an unduly discriminatory allocation of the output and associated costs of generating capacity among affiliated electric utilities, which participate in an interstate power pooling and coordination arrangement subject to the exclusive jurisdiction of FERC under Part II of the Federal Power Act, 16 U.S.C. § 824, *et seq.* ("FPA").

## STATEMENT REQUIRED BY RULE 28.1

System Energy Resources, Inc. (formerly Middle South Energy, Inc.) is a wholly-owned subsidiary of Middle South Utilities, Inc., a public utility holding company registered with the Securities and Exchange Commission pursuant to the Public Utility Holding Company Act of 1935. Middle South Utilities, Inc. also owns all of the outstanding common stock of Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company and New Orleans Public Service Inc., each of which is an electric utility operating company, and Electec, Inc., a non-utility company. Other affiliated companies include MSU System Services, Inc. (formerly Middle South Services, Inc.), a service company, System Fuels, Inc., a fuel procurement company, and Associated Natural Gas Company, a natural gas distribution company.

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System Energy Resources, Inc., an applicant in proceedings below before the FERC and intervenor in support of the respondent in the case before the United States Court of Appeals for the District of Columbia Circuit, submits this Brief In Opposition to the petitions for a writ of certiorari.[1]

## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit in *Mississippi Industries v. Federal Energy Regulatory Comm'n*, No. 85-1611 (D.C. Cir., 1987) is reported at 808 F.2d 1525 (App. la).[2] By order dated June 24, 1987, the Court of Appeals vacated a portion of its opinion, and reversed and remanded the decision of the FERC for further consideration of certain issues, but left unchanged that portion of its opinion at issue herein. That order is reported at 822 F.2d 1103 (Supp. App. Sa-3). Petitioners in Case No. 86-1380[3] make adequate reference to the two Initial Decisions of Administrative Law Judges of the FERC, the initial opinion of

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[1] The views expressed herein are concurred in and supported by respondents Louisiana Power & Light Company, Mississippi Power & Light Company and New Orleans Public Service Inc.

[2] This opinion and others are contained in the Appendix ("App.") and Supplemental Appendix ("Supp. App.") accompanying the petition in No. 86-1380, and this Brief shall make references to those appendices where appropriate.

[3] *Arkansas Public Service Comm'n v. Federal Energy Regulatory Comm'n*, No. 86-1380 (filed Feb. 20, 1987).

the FERC, and FERC's second opinion denying rehearing.[4]

## JURISDICTION

The grounds on which the jurisdiction of this Court is invoked are set forth in the petition.

## STATUTES INVOLVED

The applicable statutory provisions are identified in the petition in No. 86-1380 and are set forth in Appendices F and G to that petition (App. 527a-599a).

## STATEMENT OF THE CASE

Arkansas Power & Light Company ("AP&L"), Louisiana Power & Light Company ("LP&L"), Mississippi Power & Light Company ("MP&L") and New Orleans Public Service Inc. ("NOPSI") (collectively, "System operating companies") are affiliated electric utility operating companies. They are part of an integrated public-utility system owned by Middle South Utilities, Inc. ("MSU"), a registered holding company under the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79, *et seq.* ("PUHCA"). Collectively, the System operating companies and System Energy Resources, Inc. ("SERI") form a highly integrated network for the transmission and sale of electricity

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[4] *Middle South Energy, Inc.*, 26 F.E.R.C. (CCH) ¶63,044 (1984) (ALJ initial decision) (App. 374a); *Middle South Services, Inc.*, 30 F.E.R.C. (CCH) ¶63,030 (1985) (ALJ initial decision) (App. 223a); *Middle South Energy, Inc. and Middle South Services, Inc.*, 31 F.E.R.C. (CCH) ¶61,305 (1985) (App. 141a); *Middle South Energy, Inc. and Middle South Services, Inc.*, 32 F.E.R.C. (CCH) ¶61,425 (1985) (opinion on rehearing) (App. 97a).

in interstate commerce. App. 378a. Within this network, which is interconnected by an interstate system of extra-high voltage transmission facilities, App. 263a-270a, the System operating companies provide electric service in the states of Arkansas, Louisiana, Mississippi and Missouri, where their retail rates are regulated by five different state or local regulatory authorities.

Since 1951, the construction of new generating facilities by the System operating companies, and the interstate sale for resale of electric capacity and energy among them, has been coordinated in a series of power pooling agreements, each of which has been called the "System Agreement," on file with and subject to the exclusive jurisdiction of the FERC (App. 288a-292a). As required by §§ 11(b) and 2(a)(29) of the PUHCA, the four System operating companies and SERI are integrated electrically so that they can be "operated as a single interconnected and coordinated system" serving a single geographic region.[5]

The System Agreement specifies the manner in which capacity and energy and their associated costs will be shared at the wholesale level among the Sys-

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[5] The original System Agreement was filed at the FERC in 1951. A significantly revised System Agreement was filed and made effective in 1973 in addition to various other more limited revisions from time to time (App. 234a). Prior to the filing of the System Agreement at issue in this case, the preceding System Agreement was approved by the FERC in *Middle South Services, Inc.*, 16 F.E.R.C. (CCH) ¶61,101 (1981), *aff'd sub nom. Louisiana Public Service Comm' v. Federal Energy Regulatory Comm'n*, 688 F.2d 357 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983).

tem operating companies.[6] The generating facilities of the System operating companies are centrally dispatched, without regard to ownership, to obtain the lowest reasonable cost of energy to all the companies consistent with certain operational and reliability considerations.

SERI was formed in 1974 to finance, construct and operate the Grand Gulf Nuclear Electric Station, a two-unit nuclear fueled generating station near Port Gibson, Mississippi required to meet projected needs of the System operating companies (App. 146a-148a). All of the power available to SERI from Grand Gulf Unit No. 1 ("Grand Gulf 1"),[7] which is involved in this case, was to be sold to the System operating companies as sales for resale in interstate commerce under rates approved by the FERC.[8]

In 1982, a newly revised System Agreement and a Unit Power Sales Agreement ("UPSA") for the output of Grand Gulf 1, the two specific agreements involved in this case, were filed at the FERC. The revised System Agreement modified the manner in which the System operating companies share the costs

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[6] "Capacity" is the amount of electric energy available from a generating unit or facility, which is measured in kilowatts. "Energy" is the amount of energy delivered over time measured in kilowatt-hours. In this Brief, capacity and energy, when referred to together, will be called "power" or "output."

[7] SERI owns ninety percent of Grand Gulf 1. A rural electric power association, not involved in this case, owns the remaining ten percent. Construction of Grand Gulf Unit No. 2 is incomplete.

[8] Operating together under applicable agreements, SERI and the System operating companies shall be referred to as the Middle South System in this Brief.

of generating capacity owned directly by them (App. 226a-227a). It anticipated the filing and introduction of the UPSA into the overall contractual arrangements coordinating wholesale power sales within the Middle South System (App. 350a-353a).

All four System operating companies together with MSU, their parent company, jointly participated in the decisions to initiate construction of Grand Gulf 1, to continue and complete the construction, and to allocate the output of the unit (App. 428a). Each System operating company is a party to the UPSA.

Under the UPSA, SERI agreed to sell power from Grand Gulf 1 to the System operating companies (App. 377a-379a). In the UPSA, shares of power applicable to each of the System operating companies were specified in accordance with an earlier agreement among them. The entitlement or allocation shares (expressed as percentages), in conjunction with various cost of service provisions determined what each System operating company would pay for the power. Thus, the entitlement percentages together with the cost of service provisions constitute SERI's wholesale rates for the sale of the output of Grand Gulf 1, and the UPSA was designated by the FERC as SERI's first rate schedule.[9] Collectively, the rates would generate revenues sufficient to recover the costs of SERI's portion of the output of Grand Gulf 1 (App. 378a-379a).

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[9] Capacity purchased by each System operating company under the UPSA also affects the payments the companies make and receive for capacity equalization transactions under the System Agreement. Thus each company's entitlement to power from Grand Gulf 1 under the UPSA directly affects the rates for equalization payments under the System Agreement (App. 33a-34a).

Subsequently, lengthy hearings were held at the FERC in two separate proceedings in which parties, including the regulatory agencies having jurisdiction over the retail rates of each of the System operating companies and the attorneys general of Arkansas, Louisiana and Mississippi, advocated adoption of various output and cost allocation plans. The goal of each of the various proposed allocation plans was to minimize overall power costs to the System operating company or companies located in the jurisdiction of the party proposing the plan. Adoption of any one of these allocation proposals favoring a particular System operating company would have correspondingly increased the allocation of costs to the other System operating companies (App. 229a, 282a-288a, 38la, 384a-386a).

At the conclusion of the proceedings, the FERC issued its opinion which found that the System Agreement and the UPSA, taken together as filed, were unjust and unreasonable (App. 191a).[10] It determined, in order to make the overall power pooling and coordination arrangement of the Middle South System just and reasonable, that the entitlement percentages for Grand Gulf 1 established in the UPSA should be revised as follows:

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[10] An Administrative Law Judge had previously concluded that the proposed allocation of Grand Gulf 1 "results in an unjust, unreasonable, and unduly discriminatory allocation of costs among the Middle South operating companies and the localities and customers served by the Middle South System." *Middle South Energy, Inc.*, 26 F.E.R.C. (CCH) ¶63,044 at 65,108 (App. 414a).

Entitlement Percentages—Grand Gulf 1

| Company | As Filed by SERI | As Ordered by FERC |
|---|---|---|
| AP&L | 0.00% | 36% |
| LP&L | 38.57% | 14% |
| MP&L | 31.63% | 33% |
| NOPSI | 29.80% | 17% |

(App. 192a).

The Commission concluded that the System Agreement in conjunction with the UPSA as modified by its decision would "achieve just and reasonable results" (App. 191a). Petitioners had argued throughout the hearing dealing specifically with the UPSA that because the entitlement or allocation percentages in the original agreement concerned generating capacity, the FERC had no jurisdiction under the FPA to modify those percentages. These arguments were carefully considered and expressly rejected by the FERC in its opinion and on rehearing. 31 F.E.R.C. (CCH) ¶61,305 at 61,643-61,645 (App. 167a-170a), 32 F.E.R.C. at 61,949 (App. 104a-111a).

FERC also found that the Middle South System constituted a highly coordinated and integrated electric system in which "planning, constructing and operations" are conducted primarily for "the system as a whole," and "major critical decisions, including decisions to build new generating units," are made "for the benefit of the system as a whole" (App. 172a-173a).

On petitions for review, the Court of Appeals unanimously affirmed the Commission's jurisdiction over the UPSA and the System Agreement, and its authority to modify the allocation percentages for Grand Gulf 1:

The distribution of Grand Gulf costs and capacity in the UPSA inevitably affects each operating company's generation costs and, by extension, their wholesale rates. When, as here, generation capacity has been built and planned on a profoundly integrated basis, the Commission properly may examine its allocation as a cost component affecting wholesale rates. For this purpose, the UPSA cannot be examined in isolation. As the Commission stated, the UPSA is "an agreement which 'supplements or supersedes' the coordination arrangements among the MSU utilities, and . . . is a contract 'affecting' rates under the 1982 System Agreement."

* * *

Having determined that all MSU generating capacity, including Grand Gulf, had been built and planned on an integrated basis by the MSU system to meet its collective needs and that the allocation of Grand Gulf would affect wholesale rates within the system, the Commission decided that the affiliated operating companies' arrangement for sharing of capacity costs—as set forth in the UPSA and the 1982 System Agreement—was unjust, unreasonable and unduly discriminatory. Under these circumstances, sections 205 and 206 of the FPA plainly provide FERC with authority to modify the Grand Gulf allocation

agreed to by the operating companies.

App. 33a-34a (footnote omitted), 38a-39a.[11]

## REASONS FOR DENYING THE WRIT

### A. Introduction

The question presented is governed by the jurisdictional and remedial provisions of Part II of the FPA, 16 U.S.C. §§ 824-824k (App. 527a-554a). Section 201(b)(1) gives the FERC jurisdiction over all facilities used for the transmission or sale at wholesale of electric energy in interstate commerce. 16 U.S.C. § 824(b)(1). There is no contention that SERI and the System operating companies are not "public utilities," as defined in § 201(e) of the FPA, 16 U.S.C. § 824(e), or that the UPSA and System Agreement are not contracts for the interstate wholesale sale of electric energy which must be just, reasonable and nondiscriminatory under §§ 205 and 206 of the FPA. 16 U.S.C. §§ 824d, 824e (App. 537a-541a). Therefore, the decision of the Court of Appeals correctly applies well-established principles defining federal authority under the FPA to the unique facts of the Middle South System. The decision below is correct and there is

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[11] The Court of Appeals initially affirmed the Commission's remedy under § 206 prescribing a new allocation, but Judge Bork dissented from this aspect of the decision. The court en banc vacated the portion of the decision from which Judge Bork had dissented and ordered the case reheard. The en banc court subsequently vacated its rehearing order and returned the case to the panel. Ruling unanimously, the panel granted rehearing and reversed the Commission's decision for the reasons set forth in Judge Bork's dissent. It remanded the case for further consideration of the merits of the Commission's allocations (Supp. App. 1a-16a).

no conflict with any decision of any other court of appeals or this Court. Further review of the jurisdictional determination of the FERC and the Court of Appeals is unnecessary and unwarranted.

Petitioners' principal claims concern the FERC's power to remedy what FERC determined to be unreasonable rates as a result of the allocation of the costs and output of Grand Gulf 1 in the UPSA as originally filed. Although two Administrative Law Judges and the FERC itself determined that AP&L, as well as the other System operating companies, should bear an allocation of Grand Gulf 1, petitioners contend that the FERC is powerless to allocate any costs of Grand Gulf 1 to AP&L simply because AP&L's allocation percentage in the UPSA as filed was zero. According to the argument, FERC is helpless to modify the allocation percentages in admittedly jurisdictional rate schedules because § 201(b)(1) denies jurisdiction over facilities used for the generation of electric energy and limits the Commission's jurisdiction to "sales" at wholesale, not "purchases." Thus, they mistakenly argue that FERC had no authority to allocate wholesale power from Grand Gulf 1, or, in any event, had no authority to require AP&L to purchase a portion of the output of Grand Gulf 1.

These claims are without merit. The underlying FERC proceedings address the unique facts and circumstances of two closely related agreements—the UPSA and the System Agreement—which together establish an allocation of wholesale power and associated wholesale costs among the affiliated utility companies of the Middle South System. These agreements involve the sale of the output of generating facilities, including Grand Gulf 1, and not the sale of

any generating facilities themselves. The exclusion of generating facilities from the Commission's jurisdiction does not foreclose or limit in any manner its jurisdiction over a sale of the *output* of generating facilities for resale in interstate commerce.

The System Agreement and UPSA are clearly beyond the authority of any single state to regulate. Federal regulation is essential to assure a just and reasonable allocation of wholesale power and costs among utilities operating in several states, and this regulation does not interfere with the proper role of state regulation in our system of dual rate regulation.

This case is intensely fact-bound and thus the decision of the Court of Appeals does not, as petitioners mistakenly claim, radically restructure the pattern of federal and state jurisdiction Congress has prescribed. Instead, the decision properly disposes of a narrow challenge to FERC's broad and exclusive authority to regulate public utilities under the FPA.

**B. The Decision Below Is Consistent With Long-Standing Precedent Regarding The FERC's Jurisdiction Under The Federal Power Act And Does Not Present A Significant, Unanswered Legal Question.**

SERI and the System operating companies are public utilities subject to regulation by the FERC under Part II of the FPA.[12] The System Agreement and the UPSA are agreements for the sale of electricity for resale in interstate commerce. Accordingly, the agree-

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[12] Section 201(e) defines "public utility" as "any person who owns or operates facilities subject to the jurisdiction of the Commission under this sub-chapter" (App. 528a). No party contested that SERI and each of the System operating companies are public utilities as defined in the FPA.

ments are required to be filed as jurisdictional rate schedules with the FERC pursuant to § 205 of the FPA and are subject to modification by the FERC pursuant to its exclusive and plenary authority under §§ 205 and 206. *Federal Power Comm'n v. Southern California Edison Co.*, 376 U.S. 205, 215-216 (1964). The Court of Appeals, therefore, correctly held that the FERC has authority to modify the allocation percentages in UPSA, which "inevitably" affect wholesale rates. (App. 33a-34a).

While recognizing that the FERC has the authority and duty to regulate the agreements, the petitioners contend that the FERC's ability to reallocate the output and costs of Grand Gulf 1 among the System operating companies is limited by § 201(b)(1) of the FPA, which provides that the FERC does "not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy." This argument was carefully considered by the Court of Appeals and properly rejected.

Interpretation of the limitation in § 201(b)(1) of the FPA to preclude modification of the allocation of Grand Gulf 1 among the System operating companies would defeat Congress' purpose in §§ 205 and 206 to empower the Commission to revise the terms and conditions of jurisdictional rate schedules found by it to be unjust, unreasonable or unduly discriminatory. For this reason, both the FERC (App. 105a-106a) and the Court of Appeals (App. 41a-43a) correctly concluded that the FERC has jurisdiction over matters pertaining to generating facilities to the extent that

such facilities are used by a public utility for interstate wholesale sales.[13]

Petitioners' contention that *Connecticut Light & Power Co. v. Federal Power Comm'n*, 324 U.S. 515 (1945), supports their interpretation of the generating facilities exclusion in § 201(b)(1) is erroneous. In that case the Court was specifically concerned with the local distribution facilities exception of § 201(b)(1) rather than the generating facilities exclusion, and this distinction was clearly recognized. In any event, in *Connecticut Light & Power* the Court merely held that facilities used to make local retail sales were not subject to the Commission's jurisdiction under § 201 of the FPA (App. 527a-529a) even though some of the power had been transmitted in interstate commerce before it reached the facilities that were to be used for local distribution. In contrast, Grand Gulf 1 is used solely to make interstate wholesale sales to the System operating companies. Thus, the Commission has jurisdiction over matters pertaining to Grand Gulf 1 to the extent that the unit is used to make a sale of electric energy for resale, a subject matter which in the words of § 201(e), is "subject to the jurisdiction of the Commission." The "except" clause of § 201(b) would preclude, of course, FERC jurisdiction over the sale of the Grand Gulf 1 generating facility itself, which would otherwise be subject to FERC's jurisdiction under § 203 of the FPA, 16 U.S.C. § 824b (App. 533a), but it does not preclude jurisdiction over rates for the sale for resale of the

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[13] The FERC has reiterated this determination more recently in *Ocean State Power*, 38 F.E.R.C. (CCH) ¶61,140 at 61,380 n.4 (1987); and *AEP Generating Co. and Kentucky Power Co.*, 38 F.E.R.C. (CCH) ¶61,243 at 61,824 (1987).

unit's output in interstate commerce pursuant to a unit power sales agreement.[14]

Petitioners' contention that the Commission's reallocation of the output and costs of Grand Gulf 1 unlawfully forces AP&L to purchase a portion of the output of Grand Gulf 1 is also erroneous. The decision below properly found no merit to this contention. As observed in detail by the Court of Appeals, the Commission's authority to modify the allocation percentages applicable to Grand Gulf 1 must be viewed in light of the substantiated finding that the UPSA "supplements" the voluntary power pooling and coordination arrangement among the System operating companies (App. 111a). This Court's decision in *Pennsylvania Water & Power Co. v. Federal Power Comm'n*, 343 U.S. 414 (1952), is a compelling precedent that the FERC has jurisdiction to allocate the costs and output of Grand Gulf 1.

*Pennsylvania Water & Power* concerned the Commission's authority to order continued integrated operations by two utilities and purchases and sales between them. The utilities for more than 20 years had been interconnected and had bought and sold power in a coordinated manner. 343 U.S. at 421. The Commission, under § 206(a), ordered a major reduction in the rates charged by one utility to the other. Dissatisfied, the selling utility then failed to comply and obtained, in other litigation, a declaration that

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[14] A unit power sales agreement like the UPSA provides for a sale of power from a particular generating unit rather than from a system mix of generating resources. The UPSA is an integral part of the total arrangement for wholesale sales within the Middle South System.

the agreement between the two utilities was unenforceable under the antitrust laws. *Id.* at 417, 421.

Since the utility would not make a satisfactory filing to conform the contract to the Commission's rate order, the Commission itself entered an order under § 206 reforming the contract to comply with the order. In the Court's words, the order required the utility to "continue to *buy*, sell, and transmit power in the same coordinated manner" as in the past, but under the lower rates. *Id.* at 421 (emphasis added).

This Court sustained the order. The Court observed that the prior integration of the utilities was a "practice" within the meaning of § 206(a) and that the Commission was empowered under that section to order the integration continued and to determine appropriate contractual terms to that end:

> The Act gives the Commission ample statutory power to order Penn Water and Consolidated to continue their long-existing operational "practice" of integrating their power output.... In ordering such "practice" continued, the Commission was furthering the expressly declared policy of the Act.

*Id.* at 422-23. The Court said that the legal duty under the terms of service ordered into effect under § 206(a) "springs from the Commission's authority, not from the law of private contracts." *Id.* at 422.

Reynolds Metals Company ("Reynolds") and other Petitioners attempt to distinguish *Pennsylvania Water & Power* on the grounds that it involved the continuation of existing power exchange arrangements, while the FERC order in this proceeding involves

imposition of a new purchase obligation.[15] This attempt is without merit since the FERC and the Court of Appeals both found that the UPSA supplements the "coordination arrangements among the MSU utilities, and . . . is a contract 'affecting' rates under the 1982 System Agreement," which in turn supplements or modifies coordination arrangements dating back to 1951 (App. 34a, 151a). Thus, the fundamental issue involves the reasonableness of proposed modifications and supplements to the terms of a longstanding and evolving power pooling, integration and coordination arrangement subject to FERC's exclusive rate jurisdiction. The rationale and holding of *Pennsylvania Water & Power* are directly on point.

The "forced purchase" argument of Petitioners is further without merit when considered in light of express factual findings regarding AP&L's involvement with Grand Gulf 1. In a finding expressly approved by the Commission (App. 169a-170a), Administrative Law Judge Liebman found "AP&L has been and is an active party and participant in the contracts and in the whole contractual process surrounding Grand Gulf to the same degree as LP&L, NOPSI and MP&L" (App. 428a). The Commission also found that the Middle South System constitutes a highly coordinated and integrated electric system in which major critical decisions, including decisions regarding Grand Gulf 1, have been made from an overall system perspective (App. 169a-189a).

Citing this Court's decision in *Federal Power Comm'n v. Conway Corporation*, 426 U.S. 271 (1976),

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[15] Petition for Writ of Certiorari of Reynolds Metals Company, *et al.*, at 26-27 (Sept. 1987) [hereinafter Reynolds Petition].

Reynolds also asserts that FERC may not impose a remedy which invades a "nonjurisdictional area." Reynolds Petition at 18-19. Thus, Reynolds mistakenly contends that although an agreement may be found to affect wholesale rates (which the UPSA and System Agreement clearly do), it does not necessarily follow "as the Court of Appeals believed" that FERC has jurisdiction to "replace it" with "what FERC believes would be just and reasonable."[16] Reynolds' use and interpretation of *Conway*, however, is out of place.

In *Conway*, the Court correctly observed that the FERC's power to prohibit undue or anticompetitive discrimination in rates subject to its jurisdiction does not invest it with power to order a public utility to increase its *retail* rates, although the FERC could consider the effect of retail rates in relation to *wholesale* rates. 426 U.S. 271, 280 (1976). Since, however, the FERC's remedy in this case only modifies wholesale rates in wholesale rate schedules, there is no invasion of a nonjurisdictional area regarding generating facilities even though generating costs are thereby allocated. It is thus clear that modification

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[16] It is misleading to suggest as Reynolds does (at footnote 16 of its Petition) that the UPSA "determined only the share of Grand Gulf's capacity and costs to be allocated to the operating companies purchasing from MSE [SERI]" but did not determine SERI's rates. The UPSA, like the System Agreement, due to the interaction of allocation percentages and provisions reflecting SERI's cost of service as allocated, clearly affects, indeed establishes, rates. As the Court of Appeals noted, the case of *Minnesota v. Federal Energy Regulatory Comm'n*, 734 F.2d 1286 (8th Cir. 1984), provides a helpful illustration of how agreements among affiliates can "affect" rates.

of the UPSA is within the Commission's express authority under §§ 205 and 206 of the FPA.

**C. The FERC's Authority To Regulate The Allocation Of Generating Costs On The Middle South System Does Not Impair Appropriate State Regulation.**

The Arkansas Public Service Commission, *et al.* ("APSC"), and Reynolds argue that the decision of the court below improperly permits the FERC to interfere with the exercise of state regulation.[17] But Congress in the FPA gave FERC plenary jurisdiction over all wholesale sales of electricity in interstate commerce except those which Congress explicitly made subject to regulation by the states.

Specifically, no interference with state authority over generating facilities, as reserved to the states in § 201(b)(1), results from the Commission's exercise of its powers under § 206 to determine just and reasonable rates and terms for the UPSA and the System Agreement. Exclusion from the FERC's jurisdiction of "facilities used for the generation of electric energy" is qualified by the phrase in § 201(b), 16 U.S.C. § 824(b), "except as specifically provided in this subchapter and subchapter III of this chapter, . . ." which was added "to remove any doubt as to the Commission jurisdiction over facilities used for the generation of electric energy to the extent provided in other sections." H.R. Rep. No. 1901, 74th Cong., 1st Sess. 74 (1935). Moreover, § 201(a) declares "that Federal regulation of matters relating to generation to the extent provided in this subchapter and of sub-

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[17] Petition for Writ of Certiorari of Arkansas Public Service Commission, *et al.* at 10-13 (February 20, 1987) [hereinafter APSC Petition]; Reynolds Petition at 13-14, 19, 24.

chapter III . . . is necessary in the public interest. . . ."

Section 201(a) also expresses Congress' intent that federal regulation "extend only to those matters which are not subject to regulation by the States." But Congress drew:

> a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPC [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.

*Federal Power Comm'n v. Southern California Edison Co.*, 376 U.S. at 215-216.

Reynolds cites *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983) for the proposition that the need of a utility for additional generating facilities is a matter for state, not federal, regulation. Reynolds Petition at 19. However, the Court in that decision emphasized that state authority over utility activities relating to power transmitted for resale in interstate commerce was limited by the FPA. The Court stated that the economic aspects of electric generation have long been regulated by states, "[w]ith the exception of the *broad* authority of the . . . Federal Energy Regulatory Commission, over the *need for and pricing of* electrical power transmitted in interstate commerce." *Pacific Gas & Electric*, 461 U.S. at 205-206 (emphasis added).

Therefore, it is unwarranted to imply, as Reynolds does, that the FERC decision constitutes a repudiation of the FPA's purpose to provide "consumer protection" or that "federal regulation necessarily means that the States have no control." Reynolds Petition at 11. The decision does nothing to change the existing scope of authority of FERC and the states under the FPA.

Moreover, exercise of exclusive FERC jurisdiction over the System Agreement and the UPSA is necessary to assure a just and reasonable allocation of power and associated costs among the System operating companies. It is well established that the FERC may modify interstate power pooling, interconnection and coordination arrangements as necessary to assure that they are just, reasonable, and not unduly discriminatory.[18] Attempts by the various retail regulatory agencies to exercise direct jurisdiction over rates and cost allocation methods involved in a multi-state power pooling and coordination arrangement would in all likelihood lead to inconsistent decisions reflecting the parochial interests of each regulatory body, rather than the broad public interest entrusted by Congress to the FERC.[19]

The APSC suggests that the decision of the Court of Appeals creates a regulatory gap in which no reg-

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[18] *See, e.g., Ohio Power Co. v. Federal Energy Regulatory Comm'n,* 668 F.2d 880 (6th Cir. 1982); *Central Iowa Power Coop. v. Federal Energy Regulatory Comm'n,* 606 F.2d 1156 (D.C. Cir. 1979); *Municipalities of Groton v. Federal Energy Regulatory Comm'n,* 587 F.2d 1296 (D.C. Cir. 1978).

[19] *Appalachian Power Co. v. Public Service Comm'n,* 812 F.2d 898, 905 (4th Cir. 1987). *See also, Western Massachusetts Electric Co.,* 23 F.E.R.C. (CCH) ¶61,025 (1983).

ulatory authority will review the prudence of power purchases. APSC Petition at 13-15. Where, as here, the issue involves the allocation of the output of generating facilities among affiliated utilities forming a highly integrated, interstate power pooling and coordinating arrangement, considerations involving the prudence of purchase are necessarily encompassed in the FERC's determination of whether the allocation of generating costs under the UPSA and the System Agreement result in just and reasonable rates. *Appalachian Power Co. v. Public Service Comm'n*, 812 F.2d 898 (4th Cir. 1987).

The grant to the FERC of comprehensive authority over the allocation of wholesale output and costs through the unique kind of interstate power pool arrangements at issue here does not render state regulatory authorities impotent. In order to protect the interests of consumers in their respective states, each affected state and local regulatory authority can intervene in proceedings before the FERC, as was done here, to advocate adoption of allocation methods deemed most appropriate and can directly appeal the FERC's decisions with respect to those proposals.

### D. All Other Asserted Reasons For Review Of The Decision Below Are Insubstantial.

None of petitioners' other arguments justify further review of this case. Some suggest that Court review is appropriate because of the potential economic impact which reallocation of Grand Gulf 1 may have on AP&L and its customers.[20] However, potential economic impact on particular parties to this case is related solely to the justness and reasonableness of the

[20] Reynolds Petition at 10-11.

rates established by FERC on the merits of the case and is not a jurisdictional issue.

The APSC and Reynolds assert that review is warranted because the Court of Appeals misconstrued this Court's recent decision in *Nantahala Power and Light Co. v. Thornburg,* 476 U.S. 953 (1986).[21] These arguments are diversionary because neither the FERC's jurisdiction to modify the allocation of Grand Gulf 1, nor the lower court's overall analysis upholding FERC's jurisdiction, depends heavily on an interpretation of *Nantahala.* The significance of *Nantahala* rests on its assessment of the obligation of states to recognize in retail rates FERC-allocated wholesale costs as a matter of federal preemption. This proposition is not at issue in this case.

*Nantahala,* does, however, concomitantly provide useful insight on the separate question whether the FERC may reallocate power pooling costs among an affiliated group of public utilities pursuant to its rate jurisdiction. Thus, the Court of Appeals did not err in simply seeing *Nantahala* as a timely "message" that FERC's jurisdiction under the circumstances presented in this case is unquestionable.

The other bases which the APSC alleges support issuance of a writ of certiorari are similarly without merit. The claim that the Court of Appeals created an unlawful distinction between FERC's authority to allocate wholesale power costs among affiliated utilities forming an integrated, interstate power pool[22] and its authority to allocate wholesale power costs

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[21] APSC Petition at 18-19; Reynolds Petition *passim.*

[22] APSC Petition at 19-21.

among unaffiliated utilities forming an integrated, interstate power pool, is refuted by the Court's reliance in part on power pool decisions involving unaffiliated utilities,[23] and on the conclusion that "the agency may exercise authority under section 206 to modify an unlawful voluntary power pool arrangement negotiated by nonaffiliates." (App. 46a).

The APSC's attempt to characterize the situation as one in which either no jurisdictional sale for resale occurred or, alternatively, one in which any such wholesale sale was accompanied by a "forced purchase" (APSC Petition at 20-21) tries to create an either/or dilemma where none exists. Factually and logically, the allegations of "forced purchase" and "no sale" can be and are answered separately. See the discussion of *Pennsylvania Water & Power*, *supra* at 15-17, showing that the former has no merit and *Minnesota v. Federal Energy Regulatory Comm'n*, 734 F.2d 1286, 1288-89 (8th Cir. 1984) (upholding FERC jurisdiction against the challenge that a coordinating agreement between affiliated public utilities served simply as a mechanism for allocating costs and did not establish a jurisdictional wholesale rate for the sale of electricity), rejecting the latter.

The claim by the APSC that the decision below conflicts with the PUHCA, is contradicted by the repeated approval by the United States Securities and Exchange Commission ("SEC") pursuant to its authority under that act of transactions among SERI

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[23] *Mississippi Industries*, (App. 44a-47a), citing *Pennsylvania Water & Power Co. v. Federal Power Comm'n*, 343 U.S. 414 (1952), and *Central Iowa Power Coop.*, 606 F.2d 1156 (D.C. Cir. 1979).

and the System operating companies relating to Grand Gulf 1, and the SEC's recognition that Congress has entrusted to the FERC exclusive jurisdiction over contracts for the sale of power among these companies.[24]

Reynolds and others also argue that review by this Court is warranted simply because of the precedential impact of the decision below on other power pools. However, as discussed, the decision merely applies the FPA and long-standing precedent to the rate schedules involved, the particular circumstances in which they were made, and the relations among the parties. It has not been shown that these particular facts and circumstances exist in any other case. Thus, any assertion that the precedential impact of the decision below will be far reaching is unpersuasive.

Finally, the APSC and Reynolds suggest[25] that the fact that the Court will give full consideration to *Mississippi Power and Light Co. v. Mississippi*, No. 86-1970 (probable jurisdiction postponed, October 5, 1987), supports or requires a grant of certiorari in this case. However, all that the two cases have in common is that they both involve Grand Gulf 1 in some fashion. In *Mississippi Power and Light Co.*, the question is whether the Supremacy Clause and the Commerce Clause of the Federal Constitution require Mississippi to set retail electric rates on the

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[24] *See, e.g., System Energy Resources, Inc.*, HCAR No. 35-24318, 37 SEC Docket (CCH) 894 (February 18, 1987); *Middle South Utilities, Inc.*, HCAR No. 23579, 32 SEC Docket (CCH) 416 (January 23, 1985) and cases cited therein.

[25] APSC Supplemental Brief at 3-4; Reynolds Petition at 28-29.

basis of the wholesale costs that MP&L has incurred under SERI's wholesale rate schedule that concededly has been in effect as SERI's FERC-approved rate schedule since July of 1985. *Mississippi Power and Light* does not present the narrow challenge to FERC's jurisdiction that the Arkansas parties raise here. Thus, certiorari should not be granted in this case unless it is independently worthy of review by this Court. For the reasons stated above, it is not.

## CONCLUSION

For the reasons set forth, the petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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